

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**W.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cheboygan, MI, Employer**

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**Docket No. 06-824  
Issued: January 26, 2007**

*Appearances:*  
*Daniel Loznak, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 8, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established a left shoulder condition and resulting disability commencing March 15, 2005 causally related to a December 17, 2003 employment injury.

**FACTUAL HISTORY**

On December 18, 2003 appellant, then a 75-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained right shoulder, arm and hand injuries when he fell on ice while in the performance of duty on December 17, 2003. He was treated by Dr. Donald Ramsey, an osteopath, on December 17, 2003. In a report of that date, Dr. Ramsey indicated that appellant fell with his right hand extended and had right shoulder and wrist pain.

A magnetic resonance imaging (MRI) scan of the right shoulder dated January 2, 2004, revealed a tear of the rotator cuff. Appellant underwent right shoulder surgery by Dr. Daniel Wilcox, an orthopedic surgeon, on February 3, 2004. The Office accepted the claim for right rotator cuff tear and contusion to the right shoulder and wrist.

A physical therapy evaluation, dated February 24, 2004 and signed by Dr. Wilcox on March 5, 2004, stated that appellant fell on December 17, 2003 and reported “falling into his right shoulder and with bilateral outstretched upper extremities with increased bilateral shoulder pain, right greater than left.” The report stated that left shoulder testing was performed and was consistent with possible glenohumeral anterior capsular disruption, rotator cuff tendinitis and increased glenohumeral joint laxity. Appellant continued to receive treatment from Dr. Wilcox for the right shoulder. A July 12, 2004 physical therapy evaluation signed by Dr. Wilcox on July 30, 2004 reported that appellant continued to have impaired range of motion and muscle performance in the right shoulder.

In a July 2, 2004 treatment note, Dr. Wilcox stated that appellant continued to have left shoulder pain that may be secondary to a rotator cuff tear. An MRI scan of the left shoulder dated July 23, 2004 revealed a partial tear of the rotator cuff. Appellant returned to a light-duty job at four hours per day on October 12, 2004.

By report dated December 10, 2004, Dr. Wilcox stated that appellant “has bilateral shoulder degenerative arthritis, which was likely exacerbated by his fall. The fall also likely resulted in a tear of his rotator cuffs.” Dr. Wilcox stated that appellant intended to have left shoulder surgery to repair the rotator cuff. In a report dated December 14, 2004, Dr. Roderick Baltzer, an attending osteopath, stated that in the course of appellant’s fall he injured both shoulders, the right worse than the left. He stated that attention was initially directed to the right shoulder, but the left shoulder had progressed to the point that surgery was contemplated.

The Office referred appellant, a statement of accepted facts and medical records to Dr. Bruce Abrams, an orthopedic surgeon. In a report dated February 19, 2005, Dr. Abrams provided a history and results on examination. He reported that left shoulder examination showed extensive degenerative changes, which preexisted the December 17, 2003 fall. Dr. Abrams opined: “If his fall was as noted in the history, directly on his right side, it is unlikely that he caused injury to or aggravated the preexisting condition of the left shoulder on December 17, 2003.”

Appellant had left shoulder surgery on March 15, 2005 and filed a claim for compensation (Form CA-7) commencing March 15, 2005. The Office determined that a conflict in the medical evidence existed and referred appellant, together with a statement of accepted facts and medical records, to Dr. Norman Pollak, a Board-certified orthopedic surgeon. In a report dated May 20, 2005, Dr. Pollak provided a history and results on examination. He reviewed medical records stating that there was no mention of left shoulder symptoms until July 2, 2004. Dr. Pollak reported that medical records indicated that appellant did sustain a right shoulder injury on December 17, 2003, along with a contusion to the right wrist. He opined: “There is no documentation in the medical records that a left shoulder injury occurred

on December 17, 2003.” Dr. Pollak indicated that he would not rate the permanent impairment in the left arm as the left shoulder condition was not felt to be secondary to the accepted employment injury.

By decision dated July 20, 2005, the Office denied appellant’s claim for compensation as of March 15, 2005. It found that a left shoulder condition had not been established as employment related.

Appellant requested a hearing, which was held on January 5, 2006. He submitted an October 25, 2005 report from Dr. Marvin Bleiberg, a Board-certified physiatrist, who provided examination results, reviewed appellant’s medical history and medical records. Dr. Bleiberg opined that the pathology in both shoulders, specifically the rotator cuff tears, were causally related to the fall on December 17, 2003.

In a decision dated February 8, 2006, the hearing representative affirmed the July 20, 2005 decision. The hearing representative found that the weight of the medical evidence was represented by Dr. Pollak.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>2</sup> Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>3</sup>

It is well established that, when a case is referred to a referee examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>4</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a right rotator cuff tear in the performance of duty on December 17, 2003, when he slipped and fell. With respect to a left shoulder injury, it

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>4</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

found that a conflict in the evidence existed under 5 U.S.C. § 8123(a).<sup>5</sup> Attending physicians Drs. Wilcox and Baltzer had supported causal relationship, while Dr. Abrams, a second opinion physician, opined that there was a preexisting degenerative condition in the left shoulder that was not aggravated by the December 17, 2003 fall.

The referee physician, Dr. Pollak, opined in his May 20, 2005 report that there was “no documentation” in the medical evidence that a left shoulder injury occurred on December 17, 2003. It is not clear, however, whether Dr. Pollak had a complete and accurate background for this statement. In his review of the medical evidence he stated that there was no mention of left shoulder symptoms until July 2, 2004. The record transmitted to the Board contains a February 24, 2004 report, by Dr. Wilcox on March 5, 2004, that reports left shoulder symptoms, indicated left shoulder testing was performed and stated that the results were consistent with possible glenohumeral anterior capsular disruption, rotator cuff tendinitis and increased glenohumeral joint laxity.

Dr. Pollak did not discuss this report in his review of the evidence. Since Dr. Pollak based his opinion on the lack of “documentation” it is important to confirm that he had a complete medical background on which to base his opinion. As noted above, to be entitled to special weight the opinion must be a reasoned opinion based on a proper factual and medical background. The case will be remanded to the Office to secure a reasoned medical report.<sup>6</sup> Dr. Pollak should be provided with all relevant medical evidence and the opinion regarding a left shoulder injury resulting from the December 17, 2003 fall should discuss the relevant evidence. After such further development as the Office deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The report from Dr. Pollak does not resolve the conflict in the medical evidence regarding a left shoulder injury and the case is remanded for proper resolution of the conflict.

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<sup>5</sup> The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulation states that, if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

<sup>6</sup> See *Roger W. Griffith*, 51 ECAB 491 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated February 8, 2006 and July 20, 2005 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 26, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board